

Report on Arthur Nicholson Recreation Ground Registered Charity No. 278976

Dated:

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Background facts

The Arthur Nicholson Recreation Ground is a trust of land governed by a trust deed dated 3 August 1929 and registered with the Charity Commission. It was established by Major Nicholson of Bidborough Hall when he donated the land to the Parish Council in memory of his son. It is registered at the Charity Commission with charity number 278976. Bidborough Parish Council are noted on the Commission records as the trustees of the charity.

The Charity Commission register for the Charity notes that there is a Scheme dated 20th August 1982. I have not had sight of this and so some of what I have reported on below has had to be in general terms and caveated that it may differ once I have had sight of the Scheme.

The objects of the charity centre around the use of the recreation ground for the parishioners of Bidborough for outdoor sports and recreation with a particular focus on cricket. The Objects state that the land is a recreation ground for the inhabitants of the Parish of Bidborough and especially for cricket so that this national game may be always in the forefront of the village sports and recreation and also for all other outdoor sports, outdoor recreations and outdoor entertainments as may be found expedient for the benefit of the inhabitants without distinction of age, sex or of political or other opinions.

The Councillors, as trustees, have leased part of the ground to the Bidborough Sports Association (BSA) for 99 years from 2017. I have not had sight of the lease and do not know the terms upon which the land was leased. I am also not a specialist in property law, so we would need to seek further advice from such specialist.

The BSA is registered with the Charity Commission (registration number 287245) and its governing documents are a Constitution adopted 26 May 1983 as amended 9 June 2005. It's charitable objects are the promotion of community participation in healthy recreation in particular by the provision of facilities for the playing of sports in the parish of Bidborough.

The land within the trust is registered at the Land Registry with title number K934559 and is described as the freehold land edged in red being The Arthur Nicholson Recreation Ground, Spring Lane, Bidborough, Tunbridge Wells. The Proprietor is stated as being The Bidborough Parish Council care of The Clerk to the Council, Evelyn Divall, Windmill Farm as trustees of charity. The Title shows a lease from 17.01.2017 to 03.08.2115. There is a restriction against any disposition to which section 117-121 or section 124 of the Charities Act 2011 applies unless the instrument contains a certificate complying with section 122(3) (a statement certifying that the charity trustees have the necessary power to dispose of the property and that they have complied with sections 117 to 121) or section 125(2) of that Act.

The Bidborough Parish Councillors include:

- Kerry Thorne (Chairman)
- Sandra Summers (Vice chairman)
- David Shepherdson

Executive Summary

The Trustees of the charity have been motivated to seek legal advice after discussions around proposals for the land prompted a review of the charity's governing document and how this should be applied. The trustees have asked for an initial review to be completed on specific points and queries and are aware that further in-depth advice is likely to be needed to follow up on this review.

The Charity Commission register for the Charity notes that there is a Scheme dated 20th August 1982. A Scheme is a legal document that changes, replaces or extends the trusts of a charity. It may

be either a fully regulating scheme, replacing a charity's previous governing document entirely, or a scheme that deals with a particular aspect of a charity's purposes or administration by amending or amplifying its governing document, or by authorising a particular action prohibited by its trusts. I presume it is the latter, but we will need sight of the Scheme to properly advise. I am also unsure what aspects of the Scheme were amended.

A clause by clause commentary on the Deed of is set out below. I have explained in general terms how the Trustees can ensure the provisions of the Trust Deed are correctly applied. To ensure the provisions of the Trust Deed are correctly applied, and to ensure the Trustees are correctly and fully discharging their duties, the Trustees will need to ensure they are holding proper trustee meetings and minuting any decisions made in those trustee minutes.

The Charity Commission have made specific reference in recent correspondence to the Committee of Management highlighted in clause 3 of the Trust Deed and it is noted that this is no longer in place. It is unclear when or why this Committee of Management was abolished and whether this was done validly or not through a change to the charity's governing document as there is no record of that change. It is believed this change may have taken place in the mid-1990s. If a valid change has not been made to remove the Committee of Management, then the Parish Council should reinstate the Committee of Management, which will ensure that the Charity is run in line its governing document. It may be possible for the trustees to resolve at a trustee minute to change this, but it would need to be agreed and minuted. I suggest we consider this issue further in separate advice.

It is also suggested that the lease to BSA is reviewed, and the reasons for this are explained below. From considering the terms of the Trust Deed, I believe it *may* have been necessary to seek Charity Commission approval for the lease to BSA, although some disposals do not need authority in the form of an order and also do not need trustees to comply with the other requirements because they are excepted, exempt or excluded from the requirements.

In many cases a disposal under value will be because it is being made to another charity with the same objects and in such a case the disposal will be exempt from the requirements of s117 (see below at 5). However, the Trustees will need to be sure that the disposal carries out the purposes of the first charity and is therefore a practical application of its charitable trust and the disposing charity has a power through its trusts to dispose of land to another charity. The documents for disposal, i.e. the lease, will need to state that the disposal falls within section 117(3) of the Charities Act 2011. So although the Charity may have had power to grant a lease, and perhaps not needed Charity Commission approval, this needs to be reviewed, and separate advice given.

I also recommend a general review of the lease and I would ask colleagues in our commercial property team to consider the terms of it. One aspect which may need to be considered is insurance of the trust property, and again I have not been provided with details of this. If the clubs using the land are insuring it, we would need to consider whether they are gaining any rights over that land by virtue of that and again this needs to be considered and separate advice given.

I would also refer the Trustees to the Charity Commission Guidance on recreation ground charities: disposal of land and buildings.

1. Interpretation of the Trust Deed

The following is a brief summary of each clause:

Clause 1: The objects clause in clause 1 describes and set out the purpose of the charity. The trustees are to hold the Trust premises, as therein defined, to permit the same to be used for the purpose of a recreation ground for the inhabitants of the Parish of Bidborough and especially for cricket [...] and also for all other outdoor sports, outdoor recreations and outdoor entertainments as may be found expedient for the benefit of the inhabitants of the Parish.

Clause 2: confirms the land shall always be known as The Arthur Nicholson Recreation Ground.

Clause 3: This clause sets out that the general management and control of the Trust premises and the arrangements of their use shall be in the Council and states that they shall appoint a Committee of Management to manage and control the recreation ground. This should consist of 6 members, defined as 'the Committee'. This is to be composed of 3 members from the Council and 3 members nominated by the local cricket club, the Stool Hall Club and Tennis Club.

Clause 4: This sets out that one third of the Committee, so two Committee members, shall retire each year in rotation at the date of the Annual Meeting.

Clause 5: this states that at the Annual Parish Meeting the report and accounts of the Council in respect of The Arthur Nicholson Recreation Ground shall be approved or otherwise and the vacancies on the Committee shall be filled up by new appointments from the Council and the Clubs (cricket, stool hall and tennis). In the event of any dispute the Council shall have the deciding say.

Clause 6: this deals with any vacancies arising from death or resignation of a Committee member and states that vacancy shall be filled by the Council or Club as appropriate from which that deceased or resigned member relates.

Clause 7: this confirms that if any of the clubs cease to exist, or if there are no clubs from which persons are willing to serve, the Council shall then decide in what way if at all the vacancy or vacancies shall be filled.

Clause 8: this confirms the proceedings of the Committee shall not be invalidated by any vacancy of a member.

Clause 9: This clause gives power to the Committee so that they may make certain changes in relation to conduct of their business in particular the terms for which the recreation ground is used and sums received in relation to this use; the appointment of an auditor, treasurer or unpaid officer; and the engagement and dismissal of such officers as they see fit.

Clause 10: this clause confirms that all payments in respect of the use of the Trust premises and all donations for the benefit of the Charity must be paid into the Trust account selected by the Council.

Clause 11: this states that all monies in the Trust account must be used in the upkeep of the premises, payments of rates and taxes and salaries of paid officers and any other outgoings necessary to support the Charity and its recreation and sports.

Clause 12: This clause states the Council is responsible for the maintenance of the land to the standard that is necessary to fulfil its purpose; the use of recreation for outdoor activities.

Clause 13: this confirms that if the Council decides by resolution to discontinue the use of the Trust premises in whole or part they shall call a meeting of the Parishioners of the Parish of Bidborough with at least 14 days' notice to be given of such meeting. If a decision is confirmed by a majority of Parishioners present and voting, the Council may with the consent of the Charity Commission then let or sell the Trust premises or part of it. Any proceeds then arising from that letting or sale after any liabilities have been settled are to be applied towards the purchase of other premises approved by the Council and held upon the trusts as for purposes as near to or the same as original, i.e. for outdoor sports, recreation and entertainment for the benefit of the inhabitants of Bidborough Parish, as approved by the Charity Commission, specifically for the games of cricket, stool ball and tennis. Any income arising may be invested. Those monies must be used for any purpose for which the income of the Trust premises may be properly applied provided the Council is at liberty to apply the whole or

any part of the proceeds of the sale of any part of the land to the improvement of the remainder of the land by the provision and erection of a pavilion or otherwise as the Council decide.

2. Ensuring the provisions of the Trust deed are correctly applied

The Arthur Nicolson Recreation Ground Charity was established by the 1929 Trust Deed. As referred to above, we also need sight of the Scheme dated 20th August 1982 to advise properly on the provisions of the Trust.

The Trustees need to be aware of the provisions of the original trust document and general charity law. The provisions should be considered at regular intervals and updated if necessary. The Trustees must also take reasonable steps to find out about legal requirements for example by reading relevant Charity Commission guidance and take appropriate advice when needed.

I have set out how the Trustees can discharge their responsibility below. In general terms, you should ensure those acting as trustees are allowed to be a trustee. I would refer you to the Charity Commission guidance CC3 The Essential Trustee: what you need to know, what you need to do, which provides useful guidance for trustees. Essentially, the Trustees must make sure the Charity complies with the Trust Deed and act in the Charity's best interests.

3. How can Trustees correctly and fully discharge their responsibility?

The Trustees of the Charity have certain responsibilities in connection with running the Charity, some are legal duties, and some are part of good practice.

The legal definition of a charity trustee is defined in section 177 Charities Act 2011 as 'persons responsible for the management and administration of the charity'.

Trustees operate within two sets of formal rules, the governing document (here the Trust Deed) and those in law, for example the Trustee Act 2000. For unincorporated charities, The Trustee Act 2000 states that whenever the duty of care applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular (a) to any special knowledge or experience that he has or holds himself out as having, and (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

I have set out below the key duties that trustees must comply with according to the Charity Commission. The Trustees must ensure:

- The Charity is carrying out its purposes for the public benefit including continual monitoring that ongoing activities support the purposes.
- They comply with the Charity's Trust Deed dated 3 August 1929 and with general charity law.
- They act in the Charity's best interests which include enabling the Charity to carry out its purposes, planning out decisions that consider short-term and long-term goals and avoiding personal conflicts of interest.
- They manage the Charity's resources responsibly which includes ensuring Charity's assets are only used in relation to be furthering the Charity's purpose and complying with restrictions on spending or selling land.
- They act with reasonable care and skill which includes taking advice where necessary and also actively taking part in all trustee meetings.
- The Charity is accountable which involves compliance with statutory accounting and reporting requirements.

4. Advising on whether it is possible to grant a lease as part of the original Trust deed

There are two issues to consider. Firstly, that the Charity has no legal personality and secondly whether the lease or sale of the land is allowed, and if it is whether or not Charity Commission is required.

A charitable trust has no legal personality:

A charitable trust is not a legal entity in its own right; it has no separate legal personality. This means that contracts cannot be entered into by or with, and property cannot be held by, the charitable trust itself. Trustees (either holding trustees or charity trustees in whom title to property is vested) must therefore be appointed to hold the legal title to an unincorporated charity's land on trust for the charity's specific purposes, usually as set out in an objects clause in its governing document.

This means that the Trustees of the trust have entered into the tenancy. You should be aware that they will have personal joint and several liability under the lease. The Trustees are entitled, provided they have acted properly within the terms of the trusts, to have any such liability met first out of the assets of the trust. If such assets are insufficient to meet the liabilities, unless they have limited their liability in the terms of the lease, the Trustees may then be personally liable for any shortfall.

Selling and leasing land

The Charity has designated land, which is often referred to as 'specie land' and/or 'permanent endowment'. This is land that is required by the Charity's governing document to be used for a particular purpose, which in this case is to provide a recreation ground.

The sale or lease of charity land is referred to as a disposal. A disposal occurs when charity land is conveyed, transferred, leased or otherwise disposed of and this includes the granting, transfer or surrender of a lease as well as freehold sales.

The Charity has a power of sale in the governing document, but this can only be exercised if the land is no longer needed as a recreation ground and with the agreement of the local inhabitants. The Trust Deed also states that Charity Commission approval should be sought in the event of sale or disposal.

Unincorporated charities such as the Arthur Nicholson Recreation Ground can also consider whether they can rely on the statutory power of sale. However, it can be difficult for charities with designated land to rely on this statutory power as any disposal must not be incompatible with the objects. In this case, the disposal seems to allow the charity's objects to be furthered and so it may be that you can rely on that power. In addition, charities can dispose of their land at undervalue to another charity that furthers their object. However, I suggest we consider this issue further in separate advice.

Generally speaking, before leasing land, charity trustees must consider the following:

- Whether they have permission to sell or lease the property – either in the governing document or in the law
- Check that there is nothing in the governing document that prevents them selling or leasing the property
- Check the charity actually owns the title to the property
- Be sure that the lease is in the charity's best interests
- Consider if the property is designated for a particular purpose, such as a recreation ground, ensure that the sale or lease does not go against this.

In your case, the lease is a long lease as a 99-year lease has been granted. A long lease is a lease over 7 years. There are certain requirements with this type of disposal that need to be fulfilled which include:

- Obtaining and considering a written reporting from a qualified surveyor;
- Advertising the disposal following advice from the surveyor; and
- Making the decision the proposed terms are satisfactory and the best that can reasonably be obtained in the circumstances of the disposal.

If a contract is entered into without complying with these self-certification requirements then to be able to complete the transaction and make a valid disposal, an application must be made to the Charity Commission for an order before completion. If an order is needed, it gives authority for the trustees to proceed and provides assurance that they have carried out the transaction openly and transparently and that it is in the best interests of the Charity.

One example of where it may be necessary to apply to the Commission is where the cost of obtaining a surveyor's report would be out of all proportion to the value of the transaction and the commission can be reasonably certain that the value of the transaction is generally low.

Some disposals do not need authority in the form of an order and also do not need trustees to comply with the other requirements of section 117 because they are excepted, exempt or excluded from the requirements. In many cases a disposal under value will be because it is being made to another charity with the same objects. In such a case the disposal will be exempt from the requirements of s117. The trustees will need to be sure that the disposal carries out the purposes of the first charity and is therefore a practical application of its charitable trust and the disposing charity has a power through its trusts to dispose of land to another charity. The documents for disposal, i.e. the lease, will need to state that the disposal falls within section 117(3) of the Charities Act 2011.

To summarise, it is possible to grant a lease as part of the original Trust Deed. We note that BSA is a charity and that it also has objects to provide recreational facilities. However, we recommend we investigate and consider this issue further as a separate piece of advice. It may be that the Commission's consent was not needed to the disposal in particular if any lease limited the use of land as a recreation ground. Having not seen the lease, and having no instructions at present to review it, we cannot comment conclusively.

5. What is the mechanism for implementing any changes to the Trust deed

I understand that there was a previous amendment to the Trust deed which is a Scheme of Arrangement 20 August 1982. As previously explained, I would require sight of this to advise fully. I will comment in general terms.

Your charity's purposes and the rules for how it should operate are set out in the Trust Deed, which is the Charity's governing document. The trustees should only change the governing document if it's in the Charity's best interest to do so. The Charity Commission gives the following examples:

- your charity's purposes aren't a practical or appropriate way to meet the need it was set up for any more
- your governing document doesn't say who your charity's trustees are or how they are appointed
- provisions explaining how you must run the charity (for example, how to arrange meetings) are no longer relevant or practical.

The Trustees need to decide that the change is necessary and what that change should be. The Trustees can make some changes themselves, but others need Charity Commission permission. The Trustees can change the Charity's governing document themselves if either: (a) the governing document specifies that they have 'the power' to make the change or (b) the law (for example, the Charities Act or the Companies Act) allows them to make this kind of change.

The Trustees will for any proposed change need to check the governing document to see whether it contains a 'power of amendment' that allows them to make that change themselves. If it does, they then need to check if the amendment is allowed by that power, and whether they need to get the commission (or someone else) to approve the change.

The Arthur Nicholson Recreation Ground is an unincorporated charity, and generally these types of charity can change their name; how its members and trustees are appointed; how its meetings should be managed; whether it can borrow or invest money; how it can work with other charities. It cannot change the rules on spending money or land held as permanent endowment, paying a trustee or someone connected to them, or third parties having the right to nominate trustees or take part in other decisions. As the Charity holds designated land, it would need Charity Commission approval to change its charitable purposes.

In general terms, if a power of amendment in a governing document is too narrow to enable the required amendment to be made, it may be possible to use the power in section 280 of the Charities Act 2011 (ChA 2011). However, if the charity's trustees are not able to use these powers to make the proposed amendment (perhaps because it involves a change to the charity's purposes or will authorise charity trustees to receive a benefit), it may be necessary to apply to the Charity Commission for either a scheme or an order under section 105 of ChA 2011 to grant a specific or general power of amendment.

As your charity is unincorporated, any changes which the Trustees are able to make can be brought into effect by the trustees agreeing the changes at a Trustee meeting and, where applicable, membership bodies (associations) normally need to agree changes at a members' meeting, such as an annual general meeting. The change takes place as soon as the change is agreed (unless changing the charity's purposes under the Charities Act power, when they come into effect 60 days after the charity sends a copy of the new governing document to the Commission).

The Trustees have a duty to notify the Commission and provide details and copies of any alterations to the Charity's governing documents (unless such changes are made by a Scheme of the Commission) (section 35(3), ChA 2011). The Commission can be notified using an online form, see Charity Commission - Change your governing document.